In the Supreme Court of the United States.

OCTOBER TERM, 1911.

TANG TUN AND LEUNG KUM WUI, petitioners,

v.

HARRY EDSELL, CHINESE INSPECTOR in charge at the port of Sumas, Wash., for the United States Government.

No. 45.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CISCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

In June, 1906, Tang Tun and his wife, Leung Kum Wui, applied at the port of Sumas, State of Washington, for permission to land in the United States, Tang Tun claiming to be a native-born citizen. They were both denied admission by the Chinese inspector in charge at that port, Harry Edsell, after a hearing. (R., 5–6, 63.) They thereupon appealed to the Secretary of Commerce and Labor, who affirmed the decision of the inspector in

charge, such affirmance being indicated by a telegram reading "Appeal Tang Tun and Leung Kum Wui dismissed," signed "Murray." (R., 19.)

Application was then made on their behalf to the District Court of the United States for the Western District of Washington for a writ of habeas corpus. (R., 2.) The petition alleged, in substance, that Tang Tun was a native-born citizen of the United States, and that the immigration authorities had denied him a fair hearing upon his application for admission and had been guilty of an abuse of official discretion. The writ having been issued (R., 7) a motion to quash the same was filed and overruled (R., 10, 12). Thereupon the respondent, Edsell, answered, denying the allegation of the petition as to Tang Tun's citizenship and the alleged abuse of authority by the immigration officials. (R., 12.)

The case was heard and determined by the District Court upon a stipulation, by which the record before the Department of Commerce and Labor of the proceedings in the case of Tang Tun and his wife was submitted for the consideration of the court in determining whether there had been an abuse of discretion by the immigration officers. (R., 16.)

The District Court found that there was an abuse of official discretion in the proceedings before the immigration authorities, and then held that Tang Tun, in the proceedings referred to, had established his claim to citizenship. It therefore directed that

he and his wife be discharged from the custody of the respondent, Edsell. (R., 20, 22, 28.)

Edsell, the inspector, appealed to the Circuit Court of Appeals, which reversed the judgment of the District Court and remanded the case with directions to dismiss the habeas corpus proceedings, finding the proceedings before the immigration authorities to have been in accordance with law. (R., 131–142.) Circuit Judge Morrow dissented on the ground of want of jurisdiction of the appeal, the question in the case, in his opinion, being a constitutional one. (R., 142.)

The case is now before this court upon writ of certiorari, granted at the October term, 1909.

QUESTIONS PRESENTED.

The record presents two questions: (1) Whether an appeal lay to the Circuit Court of Appeals, and (2) whether the proceedings before the immigration authorities show an abuse of authority on their part and a denial of a fair hearing to petitioners.

ARGUMENT.

I.

THE APPEAL WAS PROPERLY TAKEN TO THE CIRCUIT COURT OF APPEALS.

There is no constitutional question in this case. It is true the petition concluded with the averment that petitioners were deprived of their liberty without due process of law, in violation of the Constitu-

tion of the United States. (R., 2–4.) But the questions actually presented by the pleadings and decided by the District Court were whether there was an abuse of discretion by the immigration authorities, and, if so, whether Tang Tun was a native-born citizen of the United States. Neither of these questions involved the construction or application of the Constitution of the United States, and the assignments of error made by the Government to the judgment of the District Court (R., 32) present no such question.

That an abuse of discretion by the immigration officers would amount to a denial of due process of law, was settled by this court in *Chin Yow* v. *United States,* 208 U. S., 8. The Government made no assertion to the contrary in this case, but merely contended that the record of the proceedings before the immigration authorities did not show any abuse of official discretion, and therefore the District Court had no jurisdiction of the case. (See Answer, R., 12–15.)

The question as to abuse of official discretion was a question of fact, going to the jurisdiction of the District Court. (*United States* v. *Ju Toy,* 198 U. S., 253.) Having decided that there was such an abuse, and thus sustained its jurisdiction, that court proceeded to determine the question of citizenship. It is well settled that, under such circumstances, a case may go either to the Circuit Court of Appeals or this court. (*McLish* v. *Roff,* 141 U. S., 661; *United States* v. *Jahn,* 155 U. S., 114.)

Even if a constitutional question were involved, the case was properly taken to the Circuit Court of Appeals, because another question was presented and decided—the citizenship of Tang Tun (see opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of *Can Pon,* 168 Fed., 479, decided with this case, and the decisions of this court there cited).

II.

THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE IMMIGRATION AUTHORITIES—A JUDICIAL HEARING NOT REQUIRED.

The contention that there was an abuse of discretion and a denial of a fair hearing by the immigration authorities proceeds upon an erroneous conception of the law governing such proceedings.

As pointed out by the Circuit Court of Appeals (R., 134), the rights of a party claiming admission to the United States have been determined by this court in *United States* v. *Ju Toy* (198 U. S., 253) and *Chin Yow* v. *United States* (208 U. S., 8).

In the *Ju Toy case* it was held, in substance, that the decision of the immigration officers as to the citizenship of a person of Chinese descent claiming to be a native-born citizen is final and conclusive upon the courts, although adverse, in the absence of any showing that such officers have abused their official discretion.

In the *Chin Yow case* it was held that a Chinese person denied admission into the United States by the immigration authorities was entitled to a writ

of habeas corpus upon a petition alleging that he was arbitrarily denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant he should have. But the court in that case was careful to add (208 U. S., 11):

> Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. *And, by way of caution we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true even though no contrary or impeaching testimony was adduced.*

It will be observed that the opportunity to be heard accorded by the statute as interpreted by this court, is an opportunity to the petitioner fairly to present his case. The petitioner, however, contends for much broader privileges, and, in fact, practically for a judicial hearing. Thus, on page 18 of his brief, his attorney says:

> * * * While such hearing may be to some extent summary, we do not believe the

> rule contemplates it shall be other than regular, *upon evidence properly authenticated and introduced in such a way as to permit the applicant for admission to test its credibility.* The individual whose liberty or expatriation is the issue certainly ought to have the chance *to cross-examine witnesses, examine alleged public documents, or have them produced and duly proven,* and should have an issue of such great importance to him held before a fair, unbiased, and impartial tribunal.

The District Court also indicates in its opinion that it was laboring under an erroneous impression as to the nature of the hearing required by the statute when it says, in substance, that the immigration authorities could not consider the record in the office of the collector of customs showing Tang Tun's rejection in 1897, because that record was "not by any statute declared to be legal evidence, and it would not be competent in any court of the United States to prove any fact." (R., 23.)

We do not so read the decisions of this court upon the subject. If the applicant is given a fair opportunity to present his claims to admission, and they are fairly considered, we do not understand that he has any right to object to the immigration authorities making all reasonable inquiries for the purpose of testing the truth of his assertions, and especially from consulting their official records in regard thereto, which is all that was done in this case.

It is absurd to say that a judicial hearing is not required, and yet to require all the formalities of a judicial hearing to be observed by administrative officers, who are not presumed to be familiar with the rules of evidence. If the matter may be submitted to the determination of administrative officers, it must and may be determined according to administrative methods, provided the persons whose rights are so adjudicated are given a fair opportunity to present their case and no abuse of authority is shown. (*Monongahela Bridge* v. *United States,* 216 U. S., 177, 194; *The Japanese Immigrant Case,* 189 U. S., 86, 100; Cooley on Taxation, 3d Ed., p. 59; *King* v. *Mullins,* 171 U. S., 429.)

Considering the proceedings before the immigration authorities in the light of the rules as to the hearing required by the statute announced by this court, it is clear that the allegations of abuse of authority or denial of a fair hearing are entirely unfounded. A fair statement of the proceedings referred to is contained in the majority opinion of the Circuit Court of Appeals. (R., 134–142.) It shows that Tang Tun was afforded full opportunity to prove his claim of citizenship by birth, that he was advised of the fact that the official records of the customhouse at Port Townsend showed that he had been refused admission in May, 1897, and given an opportunity to explain that discrepancy as well as to furnish further proof of his nativity.

Inspector Edsell has been accused of abuse of authority, but all that the record shows is that he

exercised the utmost care in ascertaining the truth of Tang Tun's pretensions to citizenship, in the course of which, as will presently be pointed out, he disclosed an apparent fraud on the part of Tang Tun and his attorney.

If the correctness of the decision of the immigration authorities were an issue (which it is understood is not the case), the record certainly justifies their conclusion. Upon the original hearing before the inspector June 23, 1906, Tang Tun was examined at length, and two witnesses testified in his behalf. (R., 43–61.) The testimony of one of those witnesses (Coombs) was to the effect that Quong Lee, the alleged father of Tang Tun, had been a resident of Seattle since 1879; that he had two children, a boy and a girl; that Quong Lee took the children back to China in 1884 or 1885, when the boy was 4 or 5 years of age, and that when Tang Tun appeared in Seattle in 1897, 13 years later, at the store of Wa Chong, he had been told by the parties who conducted the store that he was Quong Lee's son. This witness was shown to be a professional witness of very poor memory. (R., 55–59.) The other witness (Thompson), upon whose testimony Judge Hanford, holding the District Court, chose to base his opinion that Tang Tun had been born in the United States (R., 22), appears to have had no greater information about the birth of Tang Tun or better means of identifying him than Coombs, yet he testified positively that Tang Tun

was the son of the Chinaman who left Seattle, as he says, in 1878 or 1879, when the boy was about 6 year old (R., 59–61).

After this examination Inspector Edsell appears to have examined the customs records at Port Townsend and discovered that they showed that Tang Tun had been refused admission in May, 1897 (the Chinese-exclusion laws then being administered by the Treasury Department through their collectors of customs). He thereupon gave Tang Tun a further examination, in which he was questioned as to the discrepancy between the indorsement of Collector Saunders on the identification papers that he had submitted and the original records in the customs office. (R., 62.) Tang Tun was unable to explain the discrepancy and was also unable to furnish any other witnesses as to his nativity. (Ib.) Being asked about the sister whom he had said he had had, he first testified that she was younger and then that she was older; that he did not know how long she had lived; that some one had told him, but that he had forgotten whom. (Ib.)

Then Tang Tun's attorney endeavored to perpetrate a palpable fraud upon the immigration officers by attempting to bolster up his case by the employment of two professional witnesses, Burritt and Fitzhenry. The affidavits of these parties appear at pages 73 and 74 of the record; their examination by Inspector Edsell at pages 79

and 84 of the record. In regard to the testimony of these witnesses the district judge said:

> The case appears to me to have been overworked; that is to say, the attorneys have weakened the case for their clients by unnecessarily calling as witnesses Mr. Fitzhenry and Mr. Burritt, *whose testimony as to the most important facts is unbelievable.* (R., 21.)

The vital fact in this case was the nativity of Tang Tun. Whether or not he had been admitted in 1897 was after all inconclusive, and so Inspector Edsell gave him full opportunity to prove his nativity. Upon the meager testimony of Thompson alone, who, even according to the District Court, was the only credible witness offered, Inspector Edsell refused to accept Tang Tun's claims to citizenship. In the *Chin Yow case* this court said that such action was not sufficient to give the courts jurisdiction. This would seem sufficient to dispose of this case.

TANG TUN'S NATIVE-BORN PAPER—HOW HE OBTAINED IT—ITS SIGNIFICANCE.

The fact that Tang Tun had a so-called native-born paper, with an indorsement in the handwriting of former Collector Saunders to the effect that he had been admitted into the United States in April, 1897, upon his arrival at Tacoma, Wash., on the steamer *Tacoma* from China, was not ignored by the inspector, who examined the customs records at Tacoma for the purpose of verifying

that indorsement. Those records contained the original of the indorsed paper presented by Tang Tun, such original bearing an indorsement signed by Collector Saunders that Tang Tun had been rejected May 25, 1897. (R., 63.) Walter Bowen, special deputy collector of customs under Saunders, testified to the genuineness of Collector Saunders's signature upon both the papers referred to. (R., 91–92.)

The manner in which Tang Tun obtained the identification paper containing the indorsement of Collector Saunders to the effect that he had been admitted April 20, 1897, is interesting. After first testifying that upon his arrival at Port Townsend in 1897 the collector gave him the paper (R., 47), he testified that he brought the paper to the collector, who signed it and gave it back to him (ib.); and further that the paper was his native-born paper; that when he was in China his mother wrote back to Chin Quong to fix him up a paper and send it to him, and that Chin Quong wrote to him for photographs, which he sent to him. This is what Chin Quong said on this point (R., 98–99):

> Q. Did you procure for him or help him procure this paper [showing paper presented by applicant on which he claims he was admitted by J. C. Saunders, collector of customs, in the year 1897]?—A. No; I didn't. I was in China that year—1897.
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> Q. Did you procure for him or help him procure this paper after you returned from

China?—A. I had nothing to do with his getting that paper.

Q. Then when he says that you got this paper for him he is telling what is not true, is he?—A. He is mistaken if he says that.

It is to be observed that the so-called native-born paper was not a paper required by statute. It was not prepared by any official, but by or on behalf of the Chinaman concerned. By a practice of long standing Chinese who leave the United States by a port by which they might subsequently seek reentry are permitted, as an accommodation to them and the steamship companies, to present affidavits in duplicate, one copy of which is marked by the immigration officer so as to indicate that the Chinaman referred to had departed from that port on a certain date. This copy is returned to the Chinaman, so that he may produce it to the steamship agent abroad when seeking to return and to the immigration officers on his return to such port as indicating that he had previously lived here and may have some color or claim to readmission. Such indorsement is in no sense a determination of his right to reenter. The other copy is kept by the immigration officer at the port of departure, and by virtue of its custody and use acquires an official character. In Tang Tun's case the copy retained bore the indorsement of Collector Saunders, stating that he had been refused admission to the United States upon his return to the United States in 1907.

In transmitting this case to the Secretary of Commerce and Labor, Inspector Edsell said (R., 111–112):

> I would also request your attention to exhibit three (3). This is a typewritten list of the Chinese who arrived on the steamer *Tacoma* April 10, 1897, the said list having been prepared according to the custom prevailing in the office of Collector Saunders, by which such a list of each vessel's arrivals was used for the purpose of making memoranda as to the examination and disposition of each case as it was considered by the collector of each ship. This document was found in the Port Townsend records. On the last page thereof you will note the name of "Tang Tun—son Quong Lee, born, Seattle, rejected." On page 96 appellant's witness, Mr. Bowen, volunteers information concerning the customs by which this list was prepared; on page 97 identifies this list and states that the word "rejected" opposite the appellant's name is Mr. Saunders' writing.

For Mr. Bowen's identification of this list and certificate as being in Collector Saunders's handwriting see record, pages 93–94.

In his order rejecting Tang Tun, after referring to what was shown by the Port Townsend records as to the rejection of Tang Tun in May, 1897, Inspector Edsell said (R., 63):

> It is a matter of record that another Chinaman and alleged native-born citizen of the United States who was rejected at the

same time by the Port Townsend office, having arrived on the same ship with the applicant herein, was subsequently found in the store of the Wa Chong Co., was arrested, and after due hearing of his case before the courts was ordered deported to China, and was so deported. Further, it is a matter of record that a number of other Chinese were arrested at the same time as the deported Chinaman above mentioned, all having been found in the Wa Chong store, and all having been in possession of " native-born citizen " papers bearing the alleged indorsement of Collector J. C. Saunders. Each was given due hearing before the proper courts, and each was deported to China by order of the court on a finding that the records of the Port Townsend office did not show the landing claimed.

It is not remarkable that, under these circumstances, the inspector should have refused to accept the indorsement upon Tang Tun's identification papers by former Collector Saunders to the effect that Tang Tun had been admitted in April, 1897, when at best that indorsement could be but a copy of the official records at the Port Townsend office, which showed that he had been rejected, especially in view of the experience of the department, as shown by the records, in regard to the native-born citizenship papers bearing the indorsement of Collector Saunders; nor that he should have advised the department that that view was confirmed by the passenger lists on file in the collector's office.

THE IMMIGRATION AUTHORITIES HAD A RIGHT TO REFER TO THEIR OWN RECORDS.

The propriety of the inspector officers referring to the immigration records in the customs office, in order to verify the claims of the applicant for admission, seems to be unquestionable. Those records are public records, belonging at this time to the Department of Commerce and Labor, which is now charged with the administration of the Chinese exclusion and immigration laws. The very purpose of these records is that they may be used as in this case. If a court may take judicial notice of its own records, surely the immigration authorities may of theirs. The applicant had notice of the fact that the immigration authorities were relying on these records, and had ample opportunity to impeach them if he so desired.

With regard to the exhibits which accompanied the record transmitted to the Secretary with a letter of the inspector in charge, giving the result of certain investigations conducted by him (R., 109 et seq.), it should be borne in mind that Edsell was a sworn officer of the Government, and his statements therefore entitled to credit as unbiased assertions of what he believed to be the truth; that the departmental regulations required that he comment upon the case when submitting it (rule 13 of the Chinese regulations promulgated by the Secretary of Commerce and Labor, February 5, 1906); that the exhibits were official records (and his statements related to other records of the same

nature), with the manner of creating and preserving which, it must be assumed, the Department of Commerce and Labor was familiar, as it was also with the fact that numerous Chinese holding so-called Saunders papers had been arrested and deported; and that those exhibits related only to the question whether Tang Tun had been admitted or rejected in 1897 (not the vital question at issue, which was his claim of citizenship), and were cumulative merely, the fact that he then had been rejected having been positively proved by the records of the collector's office.

THE INSPECTOR DID NOT VIOLATE THE RULES OF THE DEPARTMENT.

In regard to the charge that Inspector Edsell had violated rule 7 of the department, that a Chinese applicant for admission "should be *permitted,* after duly filing notice of appeal, to examine, but not make copies of, the evidence upon which the excluding decision is based" (brief for petitioners, p. 14), the record shows that counsel for appellant was entirely familiar with the record and the grounds of exclusion (see, among other things, brief of Attorneys Whitlock and Godfrey on the appeal to the Secretary, R., 103–108), and that on August 15, 1906, in response to a request from Attorney Godfrey, Inspector Edsell telegraphed authority for Tang Tun's attorneys to copy all the testimony in his case (R., 19, 20). They were also advised of the official records referred to by Inspector Edsell

in his excluding decision (R., 5, 63), and there is no claim that they could not have had and examined them if they had so desired.

THE APPEAL TO THE SECRETARY OF COMMERCE AND LABOR WAS PROPERLY HEARD AND DETERMINED.

District Judge Hanford assumed to interpret the telegram from the Department of Commerce and Labor to the immigration inspector in charge at Seattle, "Appeal Tang Tun and Leung Kum Wui dismissed, Murray," " as being literally true, indicating that the case did not receive any consideration whatever by the Secretary of Commerce and Labor, but some officer of the department acting for or in place of the Secretary, refused to entertain the appeal and arbitrarily, without deigning to assign a reason, dismissed it." (R., 24.)

It is not to be assumed, however, that because the Assistant Secretary, Murray, signed the telegram, he decided the case. He may have been simply communicating the action of the Secretary. It is immaterial, however, whether the Secretary or the Assistant Secretary acted in this matter, as the Assistant Secretary was fully authorized by law to act therein.

The Assistant Secretary by the terms of the act creating his office (32 Stat., 825, sec. 2) " shall perform such duties as shall be prescribed by the Secretary or required by law." The handling of the Chinese appeals was, under the practice of the department, a part of his duties from about the time of his induction into the office (see below,

where published decisions signed by him are cited). The act of the Assistant Secretary is to be regarded in law as that of the Secretary. (*Parish* v. *United States*, 100 U. S., 500, 504; *Hannibal Bridge Co.* v. *United States*, 221 U. S., 194.)

This court will judicially notice that Lawrence O. Murray was Assistant Secretary of Commerce and Labor in 1906. If any evidence of that fact is needed, it may be found in the Official Register of the United States of July 1, 1905, p. 1073, or in the record of his confirmation by the Senate as such January 7, 1904 (38 Cong. Rec., 543).

The words "appeal * * * dismissed" were used in the telegram in the sense of "decision * * * affirmed," and were so understood by petitioners and their counsel. (See petition for writ of habeas corpus, R., 2, 3.) The expression had always been used in the Treasury Department, and when the enforcement of the immigration and exclusion laws was transferred to the Department of Commerce and Labor was continued there. See published Decisions of the Treasury Department, Nos. 22884, 22901, 22911, of March 14, 20, and 22, 1901 (4 Treas. Dec., 276, 294, and 315), and No. 23539 of February 25, 1902 (5 id., 147), all decided by Assistant Secretary of the Treasury Taylor, and published Decisions of the Department of Commerce and Labor, Nos. 16, 19, 24, 56, and 92, dated April 9, 26, May 13, and September 8, 1904, and March 30, 1905, all decided by Assistant Secretary of Commerce and Labor Murray. See also *Tur-*

ner v. *Williams* (194 U. S., 279, 282), where the words were used in the same sense.

The Assistant Secretary's reason for announcing the ruling of the department upon Tang Tun's appeal by the brief and expeditious method of a telegram is obvious. The aliens had been held in detention for over two months, while the immigration officials were exerting every possible effort to ascertain the truth regarding their claims. A vessel by which deportation might be effected was to sail September 7 (R., 113), and unless availed of it would have been necessary to hold the aliens for another long period.

Another contention is that the appeal could not have had the personal attention of the Secretary (or Assistant Secretary) because the record was not received in the department until September 5 and the telegram announcing the decision was sent September 6. Reference to the record (pp 19, 113), however, will show that the case was before the department for nearly two days—from 9.50 a. m. one day to 3.35 p. m. the next—so there was ample time for that careful consideration which it must be assumed was given the case by the Secretary or the Assistant Secretary.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM R. HARR,
Assistant Attorney General.

OCTOBER, 1911.

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